No. 86-6169

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM WAYNE THOMPSON, *Petitioner,*

v.

STATE OF OKLAHOMA, *Respondent.*

On Writ Of Certiorari To The Court Of Criminal Appeals Of The State Of Oklahoma

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REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

REPLY BRIEF OF PETITIONER

Introduction

The traditions of American jurisprudence that children and adolescents are to be judged more carefully and treated less harshly than adults are ignored by the Brief of Respondent Oklahoma almost as completely as by the trial and appellate courts in proceedings below.[1] Over sixty percent of American jurisdictions—thirty-three jurisdictions encompassing over 70% of the American population—refuse to countenance the execution of anyone for a crime committed at age fifteen or younger.[2] No State that has decided to adopt an express statutory minimum age for imposing a death penalty has ever selected an age below sixteen years.[3] No State has executed any person for a crime committed at age fifteen or younger in almost forty years.[4]

The basic power of the States to execute convicted murderers is *not* at stake in this case. This case focuses on a small category of death penalty cases and only one

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[1] Certainly, the arguments of Oklahoma reflect the attitude of the Oklahoma Court of Criminal Appeals, which devoted all of two short paragraphs to the issue of the boy's youth. Only one sentence of the appellate court's opinion in this case was devoted to a "reconsideration" of whether a death sentence imposed on a juvenile violated the Eighth Amendment. *Thompson* v. *State*, 724 P.2d 780, 784 [J.A. 36, 41].

[2] As of 1985, the eighteen jurisdictions that prohibit a death sentence for anyone younger than eighteen, seventeen or sixteen (*See* Appendices A and B to this Brief) and the fifteen jurisdictions that do not have any death penalty included an estimated 71.9% of the total United States population. Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States* 22 (1987).

[3] *See* Appendix A to this Brief.

[4] The last execution of a person for a crime committed at age fifteen was on January 9, 1948 when Louisiana executed Irvin Mattio. V. Streib, *Death Penalty for Juveniles* 197 (1987).

aspect of the death penalty issue: State execution of children and adolescents is freakishly rare and inconsistent with the dominant traditions of America's criminal and juvenile jurisprudence. To divert attention from these facts, the State of Oklahoma contends that Petitioner's claims under the Eighth and Fourteenth Amendments would deprive the States of their general responsibility for defining substantive standards of criminal law. Brief of Respondent Oklahoma at 52-65. Unless the presence of any constitutional limitation on the death penalty process is a similar interference with the whole of the States' legitimate, broad powers in this area, Oklahoma's argument is false.

Citing *Jackson* v. *Virginia*, 443 U.S. 307 (1979), Oklahoma argues in favor of a rule it believes to be pertinent: A state court's finding that a person is criminally responsible should be upheld, unless, under applicable state law and upon review of the record in a light most favorable to the prosecution, a rational fact finder could not have found the defendant guilty beyond reasonable doubt. Brief of Respondent Oklahoma at 64. Oklahoma emphasizes that its procedures were constitutionally adequate to conclude that the boy ought to be punished for his intentional act of murder. Brief of Respondent Oklahoma at 58. Oklahoma's argument is that the State has applied a proper rule of criminal responsibility—whether the accused had mental capacity to distinguish between right and wrong. *Id.* at 60.

Petitioner concedes all this: Petitioner does not challenge Oklahoma's decision to hold him accountable under the State's criminal laws as if he were an adult. This case presents no question about whether Oklahoma was correct in its decision that the boy was guilty. The issue is not whether the boy will be held accountable for his crime. If this court holds in favor of Petitioner's claims, there is no

doubt that the boy will be punished—and punished severely—with a life imprisonment sentence. The question is whether he should suffer the extreme penalty of death. *See* Amici Curiae Brief of Child Welfare League of America *et al.* at 33-41. Oklahoma's defense of judicial deference to state court judgments regarding criminal responsibility has virtually nothing to do with the issues of this case.

If Oklahoma meant to go one step further and to argue that standards for reviewing a death sentence ought to be identical to standards for reviewing a State's finding of criminal accountability, Oklahoma ignores fundamental constitutional limitations on the death penalty process.

Oklahoma is repeating its argument, expressed and rejected in *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982), that the only factors that could justify reducing a sentence of death—as a matter of constitutional law—are those "which would tend to support a legal excuse from criminal liability." *Id.* at 113. In other words, in Respondent's view, if a defendant is guilty of intentional murder, and if that defendant knows the difference between right and wrong, the death penalty is constitutionally appropriate in the absence of some legal excuse. Brief of Respondent Oklahoma at 64-65.

If this is Oklahoma's position, it is extreme. It concedes little to the well-established principle that

> [B]ecause there is a qualitative difference between death and any other form of punishment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

Zant v. *Stephens*, 462 U.S. 862, 884 (1983), quoting *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976). Oklahoma's analysis concedes nothing to the legal fact

that the boy was a child under the laws of Oklahoma, and it concedes little to the special difficulties of a case in which the State seeks to decide whether a child "has lost his moral entitlement to live." *Spaziano* v. *Florida*, 468 U.S. 447, 469 (1984) (Stevens, J., dissenting).

I. OKLAHOMA'S ARGUMENT BEFORE THIS COURT WOULD, IF ADOPTED, UNDERMINE WELL-ESTABLISHED TRADITIONS THAT YOUTH BEARS ON THE FUNDAMENTAL JUSTICE OF THE DEATH PENALTY.

Despite this Court's affirmation that youth is a "relevant mitigating factor of great weight," *Eddings* v. *Oklahoma*, 455 U.S. at 116, Oklahoma's brief before this Court makes virtually no effort to demonstrate that the boy's youth was carefully and sensitively considered by jury, trial judge or appellate court. Oklahoma's argument before this Court mirrors the reality that Oklahoma courts never reviewed this case in light of this Court's insistence that youth bears directly on the fundamental justice of the death penalty. *Skipper* v. *South Carolina*, ___ U.S. ___, 106 S.Ct. 1669, 1676 (1986) (concurring opinion of Powell, J., Burger, C.J., and Rehnquist, J.). The State's arguments before this Court are only an attempt to rationalize Oklahoma's uncommon willingness to impose a death penalty despite the youth of the offender.

A. Oklahoma's Argument, If Adopted, Would Undermine *Eddings* v. *Oklahoma* By Legitimating Unbridled Jury Discretion Without Adequate Guidance That "Youth Is A Relevant Mitigating Factor Of Great Weight."

Oklahoma makes only one begrudging concession to the tradition that youthful offenders might not deserve to be treated in the same way as adults. It recognizes the "procedural requirement of allowing a murderer to introduce

evidence of his or her age as a mitigating factor." Brief of Respondent Oklahoma at 34. In Oklahoma's view, as long as the accused is not foreclosed from introducing evidence and argument regarding age and other mitigating circumstances, the jury and the state courts have virtually unrestricted discretion to sentence a child to death. *Id.* at 35.

Oklahoma's toleration of unrestricted jury choice violates constitutional principles that limit the death penalty process. "[A] jury's discretion to impose the death sentence must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'" *Booth* v. *Maryland*, ___ U.S. ___, 107 S.Ct. 2529, 2532 (1987) quoting *Gregg* v. *Georgia*, 428 U.S. 153, 189 (1976) (opinion of Stewart, J., Powell, J., and Stevens, J.). States who seek to put criminals to death "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,'" to the jury. *Godfrey* v. *Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion of Stewart, J., Blackmun, J., Powell, J. and Stevens, J) (citations omitted). The need for precision and objectivity "is particularly acute" when the responsibility of a child or adolescent is at issue. *Burger* v. *Kemp*, ___ U.S. ___, 107 S.Ct. 3114, 3141 (1987) (Powell, J., dissenting).[5] "The Constitution requires that a capital sentencing system reflect this difference in criminal responsibility between children and adults." *Id.*

When responding to the prospect of a minimum death penalty age, Oklahoma says that it favors a case-by-case assessment of youth as a mitigating circumstance. Yet the

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[5] "A specific inquiry including 'age, actual maturity, family environment, education, emotional and mental stability, and . . . prior record' is particularly relevant" when a state seeks to impose a death sentence on a juvenile. *Burger* v. *Kemp*, 107 S.Ct. at 3140 (Powell, J., dissenting).

State offers virtually no assurance that consideration of this "relevant mitigating circumstance" was meaningful, adequate or reliable as the jury deliberated in this matter of the boy's life and death.

Respondent Oklahoma makes no effort to deny: (i) The trial court failed to explain to the jury that youth is a relevant mitigating factor of great weight; (ii) The trial court misled the jury as to the boy's status as a child under the laws of Oklahoma; (iii) The prosecutor tried to condition the jury into believing that the boy's youth should not "interfere" with its deliberations; (iv) The trial court did nothing to require the jury to weigh the boy's youth against aggravating factors, and instructed the jury instead that "the determination of what are mitigating circumstances is for you as jurors to resolve"; and (v) The jury exhibited confusion about the meaning of "mitigating" circumstances.

Oklahoma's inability to show how the boy's age affected the proceedings below in any way is significant. In this case, the jury had no "substantive guidelines [to] allow[] the sentencer to make rational, objective distinctions between the egocentric homocidal conduct of a juvenile murder, and the homocidal conduct of an adult murderer." Ellison, "State Execution of Juveniles: Defining 'Youth' as a Mitigating Factor for Imposing a Sentence of Less Than Death", 11 Law and Psych. Rev. 1, 36-37 (1987).

If the factor of youth is to be given proper weight in capital sentencing decisions, the jury (or other sentencing authority) must be, first, informed of the importance of youth as a mitigating circumstance, and, second, directed to give the youth factor great weight in sentencing deliberations. Only such safeguards in a young offender's case can meet the "corresponding[ly] . . . [greater] need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U.S. at 305.

B. A Minimum Chronological Age Would Protect The Tradition That Young Offenders Must Be Judged Differently And Treated Less Harshly Than Adults Who Commit The Same Offenses.

Oklahoma contends that the justice of the death penalty must be assessed on a case-by-case basis, without *any* minimum chronological limit. Such a minimum age would, in Respondent's view, prevent the states from making careful, individualized judgments. Oklahoma argues that young offenders as a group are too diverse in their levels of emotional and moral maturity to permit an age-based line to be drawn between those who should be exempt from the death penalty and those who should not.

Oklahoma ignores crucial facts known and consistently accepted by this Court about young people. While human beings are still adolescents, they share common emotional and intellectual features which distinguish them as a class from adults. Because children and adolescents are fundamentally different than adults, American jurisprudential traditions treat the young differently—as a class.[6] Unless these traditions are to be ignored, the well-known,

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[6] As the American Bar Association as Amicus Curiae wrote:

> Our society recognizes that minors are less mature, less experienced, less able to exercise good judgment and self-restraint, more susceptible to environmental influence (both positive and negative), and as a result, less responsible and less culpable in a moral sense than adults.

Brief of Amicus Curiae American Bar Association at 3. *See also* Brief of American Society for Adolescent Psychiatry and American Orthopsychiatric Association As Amici Curiae at 3-8; Brief of Child Welfare League of America et. al. as Amici Curiae at 28-32 and 43-53; Brief of National Legal Aid and Defender Association et. al as Amici Curiae at 5-21.

widely-accepted differences between adolescents and adults compel the conclusion that the death penalty is a cruel and unusual punishment for youthful offenders.[7]

Of course, it is true that young people grow in different ways and at different rates. Still, Oklahoma is not really arguing that it seeks the death of only the most mature and the most responsible of youthful offenders. On the contrary, in the case at bar, Oklahoma takes a position consistent with its argument in *Eddings* v. *Oklahoma*, in which Counsel for Respondent explicitly defended the position that emotional maturity is not essential to warrant certification of a juvenile to stand trial as an adult *and* that a State "should [not] be required to show that a killer is emotionally mature, because probably he is not going to be." Transcript of Oral Argument, *Eddings* v. *Oklahoma*, *supra*, at 41. Rather, Oklahoma argues, the horrifying nature of a crime is enough to justify a death sentence imposed on any adolescent who knew the difference between right and wrong. Brief of Respondent Oklahoma at 65-67. Oklahoma's insistence that some brutal crimes can only be punished by death, *id.* at 67, belies the State's plea that it now wants the freedom to administer a system "sensible to the uniqueness of the individual." *Eddings* v. *Oklahoma*, 455 U.S. at 110.

[7] Respondent and its Amici suggest that drawing an age-based line is "wholly arbitrary," despite the fact that half of the death penalty states have drawn minimum lines that bar death sentences for fifteen-year-olds. *See* Appendices A and B to this brief.

An age-based line would not be arbitrary. A minimum chronological age, such as eighteen years, would serve a purpose. An age limit would protect the explicit constitutional value against cruel and unusual punishment. This value must be understood and interpreted in light of this nation's traditions, which, in this case, require a decent restraint in the judgments and punishments of the young.

This Court has found it proper to draw lines to protect constitutional values in other contexts. For example, in the first amendment context, the federal courts searched for "qualitative formula[e], hard, difficult to evade" in defense of expressive liberty. Letter from Learned Hand to Zechariah Chafee, Jr., (Jan. 2, 1921), *reprinted in* Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 Stan. L. Rev. 719, 769 app. (1975). *See also, e.g., Ballew* v. *Georgia*, 435 U.S. 223 (1978) (line drawn between five-person and six-person juries for purposes of unanimity requirement); *Baldwin* v. *New York*, 399 U.S. 66 (1970) (line drawn between imprisonment for more than six months and imprisonment for less than six months in determining right to jury trial); *Bloom* v. *Illinois*, 391 U.S. 194 (1968) (drawing line between criminal contempts which must be tried to jury and those when need not be so tried, based on states' line drawing for similarly punished crimes).

It is undeniably true, as the Respondent contends, "that this class of [young murderers is] capable of committing horrifying crimes." Brief of Respondent Oklahoma at 65. Without any question, "young murderers are capable of acts of incredible viciousness and cruelty." *Id.* at 66.

Yet, despite these truths, it must be denied—again and again—that these facts amount to a complete and adequate justification for the death penalty in any particular case or class of cases. The brutality of a crime—even extreme brutality—is not a sufficient index to moral guilt. The horrible character of all-too-many murders obscures the reality that those "who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California* v. *Brown*, ___ U.S. ___, 107 S.Ct. 837, 841 (1987) (O'Connor, J., concurring). This Court requires that juries or other sentencing authorities must give attention not only to the manner of the crime, but also to the responsibility of the criminal. *See, e.g. Sumner* v. *Shuman*, ___ U.S. ___, 107 S.Ct. 2716, 2722-23 & n.5 (1987). When analysis does focus on the moral responsibility of adolescents—even

those guilty of the most brutal crimes—the retributive justice of a death sentence against a child or adolescent is almost impossible to see.

> Adolescents who commit murder typically suffer from a variety of serious disturbances which inhibit their natural growth and development. [T]hese disturbances, acting in combination, exacerbate the already existing vulnerabilities of youth and place an adolescent at extreme risk for seriously violent behavior.

Brief of American Society for Adolescent Psychiatry and the American Orthopsychiatric Association as Amicus Curiae at 9. Careful study of those young men and women condemned to death while still children or adolescents reveals the tragic patterns that led to their individual fates. These tragic factors tend to lessen moral guilt. These condemned human beings are not innocents, but before the brutal nature of their crimes is used to obscure their humanity, this Court must remember that they are also victims: They are victims of chaotic family backgrounds; they have suffered extreme physical and sexual abuse; they have been witnesses to or victims of "sustained, repetitive" and extraordinarily brutal intrafamily violence; some suffered express or implicit family pressure to kill; often they were afflicted with severe cognitive limitations, physiological damage increasing impulsivity and volatility, and psychiatric disorders. *Id.* Under such circumstances, despite Oklahoma's arguments to the contrary, state judicial systems are not justified in believing that the brutality of the crimes "are themselves so grievous . . . that the only adequate response may be the penalty of death." Brief of Respondent Oklahoma at 67, quoting *Gregg* v. *Georgia*, 428 U.S. at 184.

Even when horrifying brutal crimes are the focus for inquiry, Respondent Oklahoma assumes a burden of proof

it cannot carry. While it is true that Petitioner cannot rely on clear-cut precedents to justify a minimum chronological age, Oklahoma cannot rely on any precedent to argue—as it does—that in this undefined class of particularly brutal murders, youth, chronological age and emotional immaturity are of no special relevance to the fundamental questions of moral guilt, personal responsibility and retributive justice.[8] As Justice Powell wrote:

> Where a capital defendant's chronological immaturity is compounded by "serious emotional problems, . . . a neglectful, sometimes even violent, family background, . . . [and] mental and emotional development . . . at a level several years below his chronological age," . . . the relevance of this information to the defendant's culpability and thus to the sentencing body, is particularly acute. *The Constitution requires that a capital sentencing system reflect this difference in criminal responsibility between children and adults.*

Burger v. *Kemp*, 107 S.Ct. at 3140 (Powell, J., dissenting).

Yet, in some cases, the brutal nature of the crime—or perhaps the inflammatory nature of the evidence—will

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[8] Oklahoma cites *Rumbaugh* v. *Procunier*, 753 F.2d 395 (5th Cir. 1983), *cert. denied sub. nom. Rumbaugh* v. *McCotter*, 473 U.S. 919 (1985) for the proposition that "a seventeen-year-old person . . . did not lack the requisite mental competence to waive his right to further judicial review of his [death] sentence." The State infers from *Rumbaugh* that "[i]f a young person can be found to be able . . . to choose to stop further appeals of his death sentence . . ., certainly a state judicial system should be able to find that certain juveniles should . . . receive the death sentence . . ." Brief of Respondent Oklahoma at 43-44.

Oklahoma misstates the *Rumbaugh* decision. The condemned man, Rumbaugh, was approximately twenty-five years old at the time he waived further appeals rights, although he had been seventeen years and ten months old at the time of his crime. V. Streib, *Death Penalty for Juveniles* 121-25 (1987).

often be enough to prevent "a reasoned moral response to the defendant's background, character and crime," *Sumner* v. *Shuman*, 107 S.Ct. at 2723 n.5; *California* v. *Brown*, 107 S.Ct. at 841 (O'Connor, J., concurring). In such tragic cases, "mere sympathy or emotion," *id.*, will all too frequently govern the outcome of the sentencing proceeding. When the facts respecting moral guilt of condemned children and adolescents are collected, as they have been by Amici American Society for Adolescent Psychiatry and American Orthopsychiatric Association, there is good reason to condemn the sensitivity, the objectivity, the fairness and the justice of a case-by-case assessment of youth as a mitigating circumstance—particularly when the crimes are the most horrifying. When a murder is particularly brutal, the reality is that the undeniable tradition of more careful, more sensitive consideration of youthful offenders[9] cannot be vindicated except by means

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[9] The Brief Amici Curiae of Kentucky et. al. argues that the Petitioner's statistics do not sustain the contention that state criminal courts are reluctant to condemn the young to death.

It is true that Petitioner's statistics are not refined in some of the respects identified by Respondent's Amici. However, they are completely adequate to verify the reluctance of the criminal system to impose death sentences on the young. Many of the factors that were not measured in petitioner's statistics still reflect the criminal justice system's reluctance to impose death sentences on children and adolescents: If an adolescent murderer escapes a death sentence because state courts refused to waive juvenile jurisdiction or because the prosecutor never requested a capital sentence or because a prosecutor accepted a plea bargain or even because a state refuses to inflict a penalty of death on anyone, the important point is that the adolescent murderer was not sentenced to die. Thus, Amici cannot deny the reality that criminal justice systems only rarely condemn the young to death.

Kentucky's Amici Brief provides no numbers at all to refute the statistics of petitioner. Indeed, when Kentucky asserts the existence of a contrary trend—that there is an increasing trend towards more juvenile executions—it provides no data whatever.

of a minimum chronological age.[10]

II. THE RELIABILITY OF THE DEATH SENTENCING PROCESS WAS UNDERMINED BY THE ADMISSION OF PREJUDICIAL, INFLAMMATORY PHOTOGRAPHS.

The Respondent failed to notify this Court of *Jones* v. *State*, 738 P.2d 525 (Okla. Cr. 1987), a case involving the same murder that led to Petitioner's death sentence.[11] In *Jones*, the Oklahoma Court of Criminal Appeals overturned the conviction and death sentence of one of the Petitioner's adult co-defendants. The appellate court also reaffirmed its strong condemnation of the trial court's

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[10] The Amici Curiae Brief of Kentucky et. al. condemns the rigidity of any "bright line" chronological age limit on the States' ability to condemn adolescents to death. However, there is not even a consensus on this point among the nineteen states signing the Amici brief.

(1) Only one of the nineteen states joining the brief currently has anyone under a sentence of death for a crime committed at age fifteen or younger. That one state, North Carolina, recently amended its death penalty statute to prohibit the death penalty for crimes committed by individuals under age seventeen (with minor exceptions). *See* Appendix A.

(2) Two other states joining the Amici Brief (Connecticut and New Mexico) have minimum ages of eighteen in their statutes.

(3) The primary author of the Amici Brief, the state of Kentucky, has recently enacted a minimum age of sixteen.

(4) The state of Kansas has no death penalty at all.

Thus, it is plain that the personal opinions of the Attorney General for these five states are not shared by the legislatures of their states or by the people of their States.

[11] The opinion was decided on May 22, 1987. It was not published until the June 6, 1987 issue of the Oklahoma Bar Journal, 58 O.B.J. 1592, after filing of the Petitioner's Brief, but two months before Respondent's Brief was filed.

admission of gruesome color photographs depicting the victim's decomposing remains.

Despite the clear findings of the Court of Criminal Appeals in the opinion below in the case at bar and in its opinion in *Jones*, the State insists that the color photographs of the victim's decomposing body had probative value and were not inflammatory so that their admission at trial did not render the trial fundamentally unfair. Brief of Respondent Oklahoma at 90-91, 94-95. In reality, the State asks this Court to substitute its own judgment on state evidentiary questions for the judgment of the Court of Criminal Appeals, which reaffirmed its judgment in *Jones*.

> A trial court abuses its discretion when it admits gruesome photographs, and the probative value of such photographs is substantially outweighed by potential prejudice to the accused.
>
> Our examination of these two color photographs leads us to conclude that their minimal probative force, in light of their cumulative nature, was substantially outweighed by the danger of unfair prejudice . . . . The two photographs depicted the body of Keene, which had been submerged for nearly a month, and was obviously in a state of decomposition. In State's Exhibit 10, the body is shown covered with algae and slime, a factor which added to its gruesomeness, and lessened its probative value as the algae partially covered the wounds. State's Exhibit No. 11, which also revealed Keene's algae covered body, depicted the body in an advanced state of decomposition as evidenced by the condition of the skin and hair, portions of which were missing. These two photographs added virtually nothing to the State's submission of proof, and served no other purpose than to inflame the jury. *See Thompson* v. *State*, 724 P.2d 780, 782 (Okl. Cr. 1986).

738 P.2d 528 (citations omitted.)[12]

In light of the appellate court's discussion of the photographs' admission in *Thompson* and *Jones*, the constitutional issue in the instant case is clarified. Petitioner need not—and does not—ask this Court to begin the difficult task of establishing constitutional standards for deciding what evidence is too gruesome and what evidence is not. When state courts find that inflammatory evidence has been erroneously admitted, state courts are obligated to recognize and remedy not only prejudice to guilt-innocence deliberations, but also the prejudice to an accused's federal rights to a fair and reliable death sentencing procedure. Thus, the mistakes of the trial court may have related to state evidentiary problems initially, but they proved to be fundamental and constitutional in their effect in this case.

Oklahoma insists that the erroneous introduction of the photographs is harmless, because "evidence in this case was strong." Brief of Respondent Oklahoma at 94 (quoting *Thompson* v. *State*, 724 P.2d 780, 783 (Okla. Crim. App. 1986).

Unlike the argument of Respondent's Brief before this Court, the Court of Criminal Appeals was focusing on whether the photographs affected deliberations over guilt and innocence. Respondent's Brief now asserts that the inflammatory photos did not prejudice the jury's determination that the murder was "especially heinous, atro-

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[12] The Court also found that the trial prosecutor in the *Jones* and *Thompson* cases, who appeared personally before the Court of Criminal Appeals to argue *Jones*, engaged in various forms of serious and prejudicial prosecutorial misconduct. *Jones*, 738 P.2d at 528-531. "[A] prosecutor is strictly prohibited from using arguments calculated to inflame the passions and prejudices of the jury." *Id.* at 529.

cious, or cruel"—although the Oklahoma Court of Criminal Appeals did not consider this point.

In other words, Oklahoma offers a new analysis that was not offered by the Court of Appeals: Because there is substantial evidence of serious physical abuse, the existence of a statutory aggravating circumstance is clear and the boy could be sentenced to death.

Respondent's analysis misses a step. Even assuming that the jury would have found an aggravating circumstance without the photographs,[13] the jury is also

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[13] Even this assumption is mistaken.

The boy's eligibility for a death sentence is supported by only one aggravating circumstance—that the murder was "especially heinous, atrocious or cruel." The jury's reactions to the crime, not to the boy, are the only articulated basis of the sentence.

The introduction of these inflammatory photographs calculated to inflame the jury, *Thompson* v. *State*, 724 P.2d at 782, along with the prosecutor's repeated, improper use of those photographs, injected powerfully emotional but legally irrelevant considerations into the jury's deliberations over the character of the killing. By riveting the jury's attention on the effects of the crime—the decomposing remains—the prosecutor distracted the jury from its real function of deciding whether the manner of this particular crime was "especially heinous, atrocious or cruel." The jury's physical and emotional revulsion at the spectacle of decomposing remains may have led the jury to apply the statutory standard improperly. *Cf. Godfrey* v. *Georgia*, 446 U.S. 420 (1980) (jury's deliberations must be channeled by clear and objective standards); *Cartwright* v. *Maynard*, 822 F.2d 1477 (10th Cir. 1987) (Oklahoma's use of "especially heinous, atrocious or cruel" aggravating standard is unconstitutionally overbroad, because objective standards to guide jury did not exist).

In short, Respondent's theories notwithstanding, if the photographs had not been misused, the jury might have decided that the killing was not so "especially heinous, atrocious or cruel" as to establish this aggravating circumstance beyond reasonable doubt. Even if a finding of this aggravating circumstance was theoretically possible, it was not logically inevitable or legally mandatory—in light of all circumstances.

required by Oklahoma's death penalty statutes to weigh the aggravating circumstances against the mitigating circumstances. 21 Okla.Stat. §§ 701.10, 701.11. *Cartwright* v. *Maynard*, 822 F.2d 1477, 1480 (10th Cir. 1987) (in Oklahoma, "the sentencer must balance all . . . statutory aggravating circumstances with all . . . mitigating circumstances.")

Oklahoma's analysis fails to come to grips with the fact that the inflammatory evidence could—and probably did—affect the jury's weighting of the single aggravating circumstance and all mitigating circumstances. The prosecutor deliberately used these inflammatory photographs to alter the jury's "balancing" of the aggravating and mitigating factors. Despite defense counsel's objections, the trial court allowed the prosecutor's inflammatory tactics, except for a mild warning not to wave the photographs in front of the jury. Under these circumstances, the emotional impact of the photographs on the jury's "balancing" and on its ultimate decision must be presumed.[14]

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[14] Respondent tries to minimize the impact of the photographs on the sentencing process by citing the jury's refusal to find that the boy would probably commit violent criminal acts again. Respondent claims that this aspect of the jury's verdict shows that it was not acting "irresponsibly." Brief of Respondent Oklahoma at 95.

The prosecutor introduced the photographs because he wanted the jurors to confront the spectacle of decomposing remains. The prosecutor wanted the jury to be revolted at the sight of the photographs. And he wanted that revulsion to drive the jury toward one, and perhaps two aggravating circumstances and a death sentence. That he was only partially successful—the jury cited only one aggravating circumstance and returned a death sentence—does not negate the presence of unconstitutional emotion and prejudice.

Indeed, the split verdict on the prosecution's bill of particulars suggests that the inflammatory photographs had great impact when the jury placed such overriding significance on the presence of the single aggravating circumstance in its final decision to impose a sentence of death.

This Court cannot affirm the death sentence in this case without turning its back on established principle that "the sentence imposed . . . should reflect a reasoned, moral response to the defendant's background, character and crime rather than mere sympathy or emotion." *California* v. *Brown*, 107 S.Ct. at 841 (O'Connor, J., concurring). *See also, e.g., Sumner* v. *Shuman*, 107 S.Ct. 2723 n.5; *Gardner* v. *Florida*, 430 U.S. 349, 358 (1977) (Any death sentence must "be, and appear to be, based on reason rather than caprice or emotion."); *Booth* v. *Maryland*, ___ U.S. ___, 107 S.Ct. 2529, 2536 (1987) (same); *Zant* v. *Stephens*, 462 U.S. at 885 (same). The photographs—and the prosecutors' use of the photographs—posed a clearer, more serious process than the victim impact statements which the Court found to be unconstitutionally admitted for jury consideration in *Booth* v. *Maryland*. Oklahoma's attempt to put a boy to death for a crime committed while he was still a child of fifteen years makes the following principles all the more pertinent:

> [A] jury must make an "individualized determination" of whether the defendant in question should be executed, based on "the character of the individual and the circumstances of the crime." . . . [E]vidence [considered during sentencing must have] some bearing on the defendant's "personal responsibility and moral guilt." To do otherwise would create the risk that a death sentence will be based on considerations that are "constitutionally impermissible or totally irrelevant to the sentencing process."

107 S.Ct. at 2533.

Moreover, these victim impact photographs were more serious violations of the accused's right to a fair sentencing proceeding than Maryland's victim impact statements in *Booth* for reasons suggested by Justice White and Justice Scalia, dissenting. Justice White emphasized that Maryland's legislature made a specific judgment "the jury

should have the testimony of the victim's family in order to assist it in weighing the degree of harm that the defendant has caused and the corresponding degree of punishment that should be inflicted." This legislative decision, Justice White argued, "was entitled to particular deference." 107 S.Ct. at 2539. In this case, by contrast, Oklahoma's legislative and judicial judgments clearly indicate that the jury should *not* have had the inflammatory photographs of decomposing remains before them. Respondent cannot argue that this Court should defer to Oklahoma's judgments about sentencing process, because Oklahoma's procedural and evidence law was violated, as held by the Court of Criminal Appeals.

Moreover, Respondent Oklahoma does not and cannot claim that jury examination of these photographs was pertinent to the jury's duty to assess the boy's "personal responsibility." 107 S.Ct. 2542 (Scalia, J., dissenting). The emotional and physical reaction to viewing decomposing remains cannot be reasonably compared to Maryland's deliberate effort "to lay before the sentencing authority the full reality of human suffering" caused by a murder. *Id.*

The Oklahoma Court of Criminal Appeals has already found that the photographs "added virtually nothing to the State's submission of proof," *Jones, supra*, 738 P.2d at 528, and that "[a]dmitting them into evidence served no purpose other than to inflame the jury." *Thompson* v. *State*, 724 P.2d at 782. Thus, it is hard to imagine how Oklahoma can now evade the lessons of *Booth* v. *Maryland*. By deliberately riveting the jury's attention on a decomposing body, the prosectuor—aided by the decisions of the trial court—created an "intolerable danger," *Caldwell* v. *Mississippi*, ___ U.S. ___, 105 S.Ct. 2633, 2641 (1985), that the jury would be "distract[ed] from its constitutionally required task—determining whether the

death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime." *Booth*, 107 S.Ct. at 2535.

CONCLUSION

Petitioner respectfully requests that this Court reverse the judgment of the Oklahoma Court of Criminal Appeals insofar as it affirmed the death sentence in this case, vacate the death sentence and grant such other relief as it deems appropriate.

Respectfully submitted,

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APPENDIX

APPENDIX A

States Establishing A Minimum Age For Death Sentences By Express Statutes

Age 18:	Age 17:	Age 16:
California	Georgia	Kentucky (1986)[2]
Colorado (1985)	New Hampshire	Nevada
Connecticut	North Carolina (1987)[1]	
Illinois	Texas	
Maryland (1987)		
Nebraska (1982)		
New Jersey (1986)		
New Mexico		
Ohio (1981)		
Oregon (1985)		
Tennessee (1984)		

Dates of statutory enactment noted for all states establishing minimum limits since 1981.

Statute citations were compiled in Appendix B of the Brief of Petitioner previously filed in this case. The notes correct and update Appendix B of the Brief of Petitioner.

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[1] North Carolina amended its statutes to establish a minimum age for the death penalty, except for prisoners who kill after a prior conviction for murder. N.C. Gen. Stat. §14-17 (House Bill 541, July 29, 1987).

[2] Ky. Rev. Stat. Ann. §640.040 (1986).

APPENDIX B

States With An Implied Minimum Age For Death Sentences Based On An Express Minimum Age For Adult Court Jurisdiction

Age 16:	Age 15:	Age 14:
Indiana (1987)[1]	Louisiana	Alabama
	Virginia	Arkansas
		Idaho
		Missouri
		Utah

Age 13:	Age 12:
Mississippi	Montana

Statute citations were compiled in Appendix B of the Brief of Petitioner previously filed in this case. The notes correct and update Appendix B of the Brief of Petitioner.

NOTE: Since the death penalty cannot be imposed by juvenile courts, a statute with an express minimum age for adult court jurisdiction has the effect of setting a minimum chronological age for capital punishment. It is clear from the legislative history of many of these statutes that the effect on the death penalty was not explicitly considered when these statutes were enacted. V. Streib, *Death Penalty for Juveniles* 43-45 (1987). As noted, Indiana is an exception to this generalization.

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[1] Ind. Code Ann. §31-6-2-4 (H.B. 1022 1987) (minimum age sixteen for general criminal court jurisdiction, but legislative debate centered on the proper minimum age for imposing death sentences).